Nos. 76-554 and 76-555

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In the Supreme Court of the United States

OCTOBER TERM, 1976

TULARE LAKE CANAL CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

SALYER LAND COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-87A) is reported at 535 F. 2d 1093. The opinion of the district court (Pet. App. 91A-97A) is reported at 340 F. Supp. 1185.

JURISDICTION

The judgment of the court of appeals (omitted from petitioners' appendix) was entered on April 5, 1976. Timely petitions for rehearing with *en banc* suggestions were denied

on June 7, 1976 (Pet. App. 88A-90A). On August 13, 1976, Mr. Justice Rehnquist extended the time to file the petitions for a writ of certiorari to October 20, 1976. The petitions were filed on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress, in the Flood Control Act of 1944, by inference exempted water users in the Kings River service area who receive irrigation benefits from Pine Flat Dam and Reservoir from the acreage limitation provisions of federal reclamation law.

2. Whether Congress intended to permit landowners, otherwise subject to the acreage limitation provisions of federal reclamation law, to avoid sale of excess acreage by prepayment of those construction costs of a project allocable to irrigation benefits.

STATEMENT

The United States brought this action in the United States District Court for the Eastern District of California to restrain petitioner Tulare Lake Canal Company from delivering "project water" from the Pine Flat Dam project to excess landholdings unless the owners of the excess lands executed recordable contracts for sale in compliance with Section 46 of the Omnibus Adjustment Act of May 25, 1926, 44 Stat. 649, as amended, 43 U.S.C. 423(e) (Pet. App. 93A). The action was brought as a "test case" in order to obtain a binding resolution of a continuing dispute between the United States and water diverting entities on the Kings River over application of the federal reclamation laws, including excess acreage limitations, to Kings River projects.

The United States has asserted throughout this litigation that the Flood Control Act of 1944, 58 Stat. 887, as amended, 16 U.S.C. 460d, authorizing the Pine Flat Dam,

made federal reclamation law applicable to that project (Pet. App. 94A). In particular, the United States believes that petitioners must comply with Section 46 of the Omnibus Adjustment Act of May 25, 1926, which prohibits delivery of project water to "irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres" unless the owner of the excess lands executes "valid recordable contracts for the sale of such lands * * *." Petitioners, on the other hand, have argued that the Flood Control Act of 1944 renders federal reclamation law inapplicable to the Pine Flat Dam project and that, in any event, sale of excess lands is not required when the owners of such lands prepay their share of construction costs for the project allocable to irrigation benefits.

The district court accepted petitioners' position on both grounds (Pet. App. 91A-97A). In a lengthy opinion, the court of appeals reversed, holding that Congress had specifically rejected the proposal that federal reclamation laws not apply to projects authorized under the Flood Control Act of 1944, including the Pine Flat Dam project in particular, and that petitioners' efforts to secure judicial modification of this decision should likewise be rejected. The court also concluded that Congress did not intend to permit the objectives of the excess acreage provisions in federal reclamation law—"to encourage family farms, distribute the reclamation subsidy widely, and avoid speculation"(Pet. App. 67A)—to be defeated by prepayment of construction costs allocable to irrigation benefits. Denying a petition for rehearing, the court of appeals pointed out that owners of excess lands remained free to retain all their lands and forego the irrigation benefits but could not take project water for such lands without compliance with governing reclamation law (Pet. App. 89A-90A).

ARGUMENT

This case, while of apparent significance to the particular landowners involved, involves no issue of demonstrated general importance, conflicts with no decision of this Court or any court of appeals, and does not merit further review. We believe that the court of appeals, which gave this matter extensive consideration and wrote a thorough opinion, correctly decided that petitioners are subject to the federal reclamation laws, including the excess-acreage limitations, and cannot avoid the policies of those laws, and secure a windfall from construction of the Pine Flat Dam, by prepayment of the construction costs allocable to irrigation benefits.[1]

1. Although projects authorized under the Flood Control Act of 1944 are widely dispersed throughout the country, no other federal court of appeals has yet been called upon by landowners to hold the federal reclamation laws inapplicable to such projects. Indeed, petitioners themselves do not argue that the federal reclamation laws never apply to Flood Control Act projects but rather that such laws apply only where the Department of Interior has constructed additional irrigation works (Pet. 36-37).[2] In this case, petitioners state that no irrigation works were added, that project water was already fully appropriated, and that no new lands were reclaimed. In view of these narrow circumstances, and the absence of litigation during the past

[1]We also agree with the court of appeals (Pet. App. 41A) that, contrary to the assertion of petitioner in No. 76-555, Congress intended that Section 8 of the Flood Control Act of 1944 should apply to the lands of Tulare Lake Basin despite their origins as swamplands. As the court noted (*ibid.*), "[o]nly a brief exposure to reclamation jargon is required to learn that all of the land area of the United States west of the 98th meridian is commonly referred to as 'arid or semi-arid.'"

[2]Citations to "Pet.," unless otherwise noted, refer to the petition filed in No. 76-554.

thirty-two years, the application of reclamation laws to Flood Control Act projects is not an issue of sufficient immediacy and importance to warrant this Court's attention.

Nor does the question of prepayment of construction costs under the Omnibus Adjustment Act of May 25, 1926 merit further review. Although the court of appeals described (Pet. App. 43A) this issue as "the more far reaching" of the two questions presented in this case, apparently the question has not proved sufficiently troublesome to require the attention of any other federal court of appeals.[3] Moreover, despite the broad applicability of the federal reclamation laws, transfer of excess lands under the 1926 Act will have occurred in many cases and prepayment theories would now be inapplicable to such lands. "Ordinarily, * * * disposition of lands pursuant to recordable contracts would be expected to have occurred long before the usual repayment period has run its course so that by the end of that period few, if any, lands would in the usual case remain subject to the recordable contracts" (68 I.D. 370, 376). We do not believe this to be a proper case in which to consider whether retention of excess lands may have been permitted in other instances (Pet. 31) and, if so, what the consequences of such action should be.[4]

[3]We note that two cases involving the applicability of acreage limitations and residency requirements to lands in the Imperial Valley in California, but presenting somewhat different issues from the narrow issues presented in this case, are now under consideration in the Ninth Circuit. *United States* v. *Imperial Irrigation District* and *Yellen* v. *Morton*, Nos. 71-2124, 73-1333, and 73-1388.

[4]Although officials in the Department of the Interior for a relatively brief period regarded prepayment of construction costs as a possible alternative to sale of excess lands (Pet. App. 79A *et seq.*), that position was repudiated in 1961 (68 I.D. 370), and has not been resurrected.

Finally, we do not believe that petitioners' predictions of economic desolation for the Tulare Lake Basin area offer any compelling reason for review by this Court. To the extent that these prophecies constitute an attack on the general objectives of the federal reclamation laws, this Court has already resolved that matter adversely to petitioners' position in *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275. To the extent that the argument represents an attack on application of the reclamation laws to the Pine Flat project alone, we note that the district court made no finding that the area could not be farmed in 160-acre tracts. Moreover, the court of appeals made clear (Pet. App. 37A-38A, 50A) that its decision in this case did not decide the question whether existing or new landowners could consolidate properties or enter into leasing arrangements so as to maximize the economic potential of these lands. The decision merely requires the initial breakup of large holdings (provided always that the landowner accepts irrigation benefits for his excess lands) to allow greater distribution of benefits from the projects.

2. In any event, we believe that the court of appeals correctly rejected petitioners' arguments a) that the Flood Control Act of 1944 exempted the Pine Flat Dam from the federal reclamation laws and b) that, should the reclamation laws be held applicable, owners of excess lands (who accept delivery of water for such lands) can nonetheless avoid executing contracts for their sale by prepaying construction costs. While full review of the court's 87-page opinion seems unwarranted, several points made in that opinion merit special emphasis.

a. Contrary to petitioners' contention (Pet. 35-37), the court of appeals properly understood the nature of the compromise reached between the California landowners, who wished the Pine Flat Project to be constructed and operated solely by the Corps of Engineers, and the

Roosevelt Administration, which sought to have the project built and operated by the Department of the Interior. The legislative history contains numerous references to the need to deny windfall profits to large landholders and to distribute the benefits of such projects to small farmers through application of the excess acreage provisions of Section 46; indeed, Congress made revisions in the 1944 Act to reflect more clearly such concerns (see generally Pet. App. 9A-43A). By contrast, the legislative history contains no evidence that Congress, despite these concerns, wished to exempt the Pine Flat Dam project.

Petitioners' related argument (Pet. 34-35) that the third sentence of Section 8 of the Flood Control Act of 1944 must be read as limited by the first and second sentences of that Section amounts, as the court of appeals pointed out (Pet. App. 39A), to an argument that the third sentence should not be read at all. The first two sentences provide ample authority for applying the reclamation laws to projects involving additional works for irrigation; the third sentence, if applied only to such projects, would simply be redundant. Nor do petitioners offer any authority to support their contention (Pet. 37) that Section 10 of the Act was intended to exempt projects that supply water storage benefits from the requirements of the reclamation laws. Had Congress wished to exempt such projects, presumably it would have said so plainly.

b. Petitioners' contention that prepayment of construction costs allocable to irrigation benefits should entitle them to retain their excess lands embodies two incorrect assumptions.

First, to sustain this contention, petitioners necessarily must argue that the objectives sought by Congress through passage of the federal reclamation laws could be achieved merely by assuring reimbursement of a fraction of a project's cost. But, as Solicitor Barry of the Department of the Interior correctly observed in 1961 (68 I.D. at 395):

> Such a qualification of Section 46 would reduce the relationship between the United States and the irrigation water users to that of debtor and creditor; it would render this provision of the Federal reclamation laws purely and simply a security device; and for the broad objectives of the reclamation program it would substitute merely the concern of a creditor for his loan.

The legislative history of Section 46 provides no basis for assigning it so narrow a purpose.

Second, petitioners must argue that prepayment of construction costs allocable to irrigation benefits leaves holders of excess lands unsubsidized by the project. This position was rejected by the court of appeals. While recognizing that such landowners by prepayment forego part of the subsidy, the court noted (Pet. App. 47A-48A):

> The benefits bestowed by a reclamation project often exceed the costs landowners are required to repay. Users of project water * * * are not charged with project costs attributable to navigation, flood control, salinity prevention, production of hydroelectric power, storage of water for industrial and municipal uses, and other uses not directly related to irrigation. They may, however, receive substantial benefits from such nonreimbursable expenditures. Over half the cost of the Kings River Project, for example, was allocated to flood control and was not charged to irrigators. Yet the benefit of flood control accrued almost entirely to irrigators through elimination of flood damage to soil, crops and livestock in Tulare Lake Basin * * *. Moreover, the value attributable to improved productivity of the land when irrigated may exceed the cost of irrigation facilities, even aside from the element of subsidy. Congress anticipated that this would be true, and was aware of the consequent serious potential

> for speculation. It was the purpose of the requirement of section 46 that excess lands be sold at ex-project prices to eliminate this windfall advantage. Thus, because of subsidy and increased productivity, the charges to be repaid by irrigators normally represent only a part of the enhancement in value resulting from the project. By paying off the allocated costs, large landowners would secure this enhanced value for themselves at a fraction of its worth. [Footnotes omitted.]

The fact that no new lands were developed by the Pine Flat Project and "private water rights" are involved does not provide a basis for exemption from the reclamation laws or even serve to distinguish this project from other projects. It has long been recognized that private rights in land are subject to this law. This Court noted in *Ivanhoe Irrigation District* v. *McCracken, supra,* 357 U.S. at 283, that much of Central Valley Project was "reclaimed and irrigated at the inception of the project." In fact, on the Madera Irrigation District 85,000 of a total of 112,000 acres had been developed for irrigation before the Central Valley Project was authorized. *Madera Irrigation District* v. *All Persons,* 47 C. 2d 681, 686, 306 P. 2d 886, 889.[5] The court of appeals and Congress were aware that reclamation project benefits often consist, not in the development of substantially more total water, but in providing the storage and regulation of water so it is available when and where needed, an important matter in the arid West (Pet. App. 4A, n. 3, and 88A).

c. Petitioners' insistence that their excess lands must be sold below "actual value" (Pet. 33) demonstrates only their disagreement with the basic, recognized policies of the

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[5]The *Ivanhoe* opinion also shows that there is nothing unfair or compulsory in this result. Large holders need not sell their excess lands as long as they do not use the new water services and rely on their own pre-existing water rights and storage and irrigation facilities (357 U.S. at 285-286).

reclamation laws. Section 46 of the Omnibus Adjustment Act of May 25, 1926 provide that the recordable contracts for sale of excess lands must be at appraised value "without reference to the proposed construction of the irrigation works." Only to the extent that proposed construction of the irrigation works causes land prices to appreciate, therefore, must the required sale be at a price below actual value. Petitioners' complaint is simply that they must be allowed to retain the fortuitous benefits created solely by the decision to proceed with the project. Those are precisely the benefits that Congress wished to distribute by requiring the sale of excess lands which receive project water.

CONCLUSION

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

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